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NO. 05-816

IN THE SUPREME COURT OF THE UNITED STATES

ORLANDO CORTEZ CLARK,

Petitioner,

v.

COLORADO DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Prison Litigation Reform Act requires dismissal of all claims brought by a prisoner, including claims that have been administratively exhausted, when at least one claim has not been exhausted.

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STATEMENT

In *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004), the Tenth Circuit held that an inmate cannot proceed on any civil rights claims concerning conditions of confinement until he has exhausted all available administrative remedies for each of those claims. The decision relied on 42 U.S.C. § 1997e(a), enacted as part of the Prison Litigation Reform Act of 1995 ("The Prison Litigation Reform Act" or "PLRA"), as well as prior rulings from this Court requiring total exhaustion of all available remedies before filing an application for a writ of habeas corpus.

In this case, the United States District Court for the District of Colorado, relying on this "total exhaustion" rule, dismissed Petitioner Orlando Clark's civil rights claim because it contained at least one unexhausted claim. The Tenth Circuit affirmed that ruling in an unpublished opinion that relied on *Ross*, although it did give him the inmate the option of dismissing, without prejudice, the unexhausted claim so that he could proceed to litigate the claims that had been exhausted. Clark requests this court grant certiorari to review the total exhaustion rule.

REASONS FOR DENYING THE PETITION

On March 6, 2006, this Court granted certiorari in *Jones v. Bock*, 05-7058 and in *Williams v. Overton*, 05-7142. These cases address the same issue as is raised here and in *Ross v. County of Bernalillo*. This case is not factually distinct from those cases. Therefore, the petition for certiorari should be held pending this Court's decisions in *Jones* and in *Williams*. If this Court adopts the "total exhaustion" rule, the petition for certiorari should be denied.

The U.S. Court of Appeals for the Tenth Circuit correctly interpreted the PLRA when it found that the PLRA requires total exhaustion of available remedies for all claims raised in the complaint. In *Ross*, an inmate sued a county jail after he slipped and fell in a shower. The Court of Appeals found that the inmate had exhausted all available remedies for his claim concerning the slippery floor. However, he had not exhausted all available remedies concerning alleged lack of medical care for his injury. The Court of Appeals agreed with the U.S. Court of Appeals for the Eighth Circuit that the PLRA requires exhaustion of all available remedies on all claims. *Ross v. County of Bernalillo*, 365 F.3d at 1188-89 (citing *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000)). The Tenth Circuit also relied on this Court's precedents concerning a "total exhaustion" requirement in habeas corpus cases. *Ross*, 365 F.3d at 1189-90. Finally, the Court observed that the purpose of the PLRA is to encourage inmates to make full use of prison grievance procedures, give prison officials the first opportunity to resolve all disputes, and provide courts with a full administrative record that would relieve the courts of the burden of winnowing exhausted from unexhausted claims. *Id.* at 1190.

Resolution of all related disputes between an inmate and prison officials in one action is consistent with the explicit language of the PLRA. As this Court has stated, "[I]nterpretation of a statute must begin with the statute's language." Mallard v. United States District Court, 490 U.S. 296, 309 (1989). Section 1997e(a) provides, in pertinent part: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The statute does not say no "claim" shall be brought until available remedies are exhausted. It does not state or imply that an action may proceed if some claims

have been exhausted while others remain unexhausted. The plain language of the statute unequivocally expresses the intent to require that an inmate complete the inmate grievance process before filing suit. *Graves v. Norris*, 218 F.3d at 885. As other parts of the PLRA note, an "action" is more than a "claim." *See, e.g.*, 18 U.S.C. § 3626(g)(2) (defining "civil action" as a "civil proceeding"). It is also significant that 42 U.S.C. § 1997e(c)(1) permits a court to dismiss an entire "action" if the "action" is frivolous, while § 1997e(c)(2) permits a court to dismiss a frivolous "claim" without requiring exhaustion of remedies while permitting the remainder of the action to proceed (provided that the inmate has exhausted all available administrative remedies as required by § 1997e(a)). In § 1997e(c)(1) and § 1997e(c)(2), Congress demonstrated that it knows the difference between an "action" and a "claim."

The purpose behind the PLRA also provides support for the total exhaustion rule. This Court has indicated that the PLRA is to be strictly interpreted as to require exhaustion wherever possible. "For litigation within § 1997e(a)'s compass, Congress has replaced the 'general rule of non-exhaustion' with a general rule of exhaustion." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). For example, in *Booth v. Churner*, 532 U.S. 731 (2001), the Supreme Court ruled that administrative remedies must be exhausted even if some of the relief sought is not available through the administrative process. This Court subsequently ruled that Congress eliminated the discretion of district courts to dispense with administrative exhaustion. Exhaustion is required even when the available administrative remedies appear futile, as long as authorities at the administrative level have power to take some responsive action. *Porter*, 534 U.S. at 529. The philosophy behind the PLRA is to reduce needless inmate litigation by giving state corrections departments the ability to resolve as many disputes as possible at their level before an inmate burdens the courts:

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. In other instances, the internal review might "filter out some frivolous claims." And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

Porter, 534 U.S. at 524-25 (emphasis added and citations omitted). Petitioner's partial exhaustion approach defeats that purpose.

The partial exhaustion rule proposed by Petitioner would also conflict with the principle of judicial economy by *always* burdening several courts, juries and witnesses with multiple trials involving the same set of facts. For example, under Petitioner's interpretation, an inmate could proceed on an excessive force claim, such as that in *Porter*, in court while still exhausting the grievance process on a related claim that medical personnel were deliberately indifferent to the injuries he allegedly sustained as a result of that force. If the guards' defense was that the force used was minimal under the circumstances, they would seek to present testimony from medical personnel that no injuries were sustained, or that the injuries were so minor as to require no

medical care. Subsequently, after exhaustion on the second claim, those same medical personnel would be required to testify in their own separate trial that they were not deliberately indifferent because there were no serious medical needs that required medical attention. Thus, two separate cases would cover the same evidence concerning the same episode. Separate discovery, pretrial conferences, witness lists, juries, and judges would be required at different times to adjudicate two claims arising out of the same episode. In contrast, the total exhaustion rule would cause the episode to be considered in one civil case after prison officials had been able to review all facets of the episode and to respond to all grievances.

The PLRA is designed to reduce inmate "suits" to a more manageable level. *Porter*, 534 U.S. at 527-28. "Split proceedings" are not only discouraged, they are banned by the PLRA. *Id.* at 530-31. By permitting multiple suits to proceed on the same related incident, Petitioner's partial exhaustion proposal defeats that purpose. In contrast, the total exhaustion principle announced in *Ross* permits the inmate to pursue all of his claims, but only after he has exhausted all of those claims so that he may only proceed with one "action." As the Tenth Circuit Court of Appeals noted, the total exhaustion rule reduces the likelihood of "piecemeal litigation." *Ross*, 365 F.3d at 1190. As inmates learn that piecemeal litigation will result in multiple filing fees, they will wish to exhaust all available administrative remedies so as to avoid piecemeal litigation. Thus, enforcement of the total exhaustion rule's sanction of dismissal will encourage each inmate to address all pending disputes with prison officials at one time, to reach resolution on as many issues as possible before resorting to the courts, and to consolidate all remaining claims in one action before one court. As this Court noted, "[R]esort to a prison

grievance process must precede resort to a court." *Porter v. Nussle*, 534 U.S. at 529 (emphasis added).[1]

In conflict with this principle, the partial exhaustion rule will either require inmates to bring related claims arising from the same episode in separate court actions or to abandon the unexhausted claims in order to proceed on the exhausted claim.[2]

As noted in *Ross*, 365 F.3d at 1189-90, in the analogous situation of federal habeas corpus relief, this Court has required an inmate to exhaust all available remedies rather than proceed to court with a split petition. The Court observed that the total exhaustion rule serves the purpose of deference to state courts. The Petitioner's partial exhaustion proposal conflicts with these decisions. *See, e.g., Preiser v.*

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[1] Another part of the PLRA is also consistent with this purpose. 28 U.S.C. § 1915(b) requires even indigent inmates to pay the filing fee in full in installment payments. Therefore, there is a great financial incentive for any inmate to combine as many claims as possible into one action rather than file claims piecemeal. The overall scheme encourages inmates to attempt to resolve all disputes with prison officials before bringing a civil action in federal court.

[2] Arguably, two separately filed claims could be joined for one trial after all available remedies have been exhausted. However, such a procedure would disrupt the original schedule established by the first judge, result in multiple discovery, and possibly require a continuance of the original trial date. The total exhaustion rule, which permits dismissal of all claims without prejudice, would make this scenario less likely by encouraging resolution of all issues at the administrative level, followed by the filing of one complaint.

Rodriguez, 411 U.S. 475, 499-500 (1973); *Rose v. Lundy*, 455 U.S. 509, 520-22 (1982).

CONCLUSION

For the foregoing reasons, this Court should hold the petition for writ of certiorari in this case pending the outcome of its decisions in *Jones* and *Williams*. If the Court reverses those cases and adopts the "total exhaustion" rule, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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